Potential Landmines in Pending Comp Time Legislation

Publication
5.13.13

On May 8, the U.S. House of Representatives passed the "Working Families Flexibility Act of 2013" (H.R. 1406) by a narrow vote of 223 to 204. The legislation would amend the federal Fair Labor Standards Act ("FLSA") to permit private sector employers to offer "comp time" off in lieu of monetary overtime compensation. Under the proposal, eligible non-union employees could agree to a comp time arrangement "in writing or [in an] otherwise verifiable record." Participating employees would then receive at least 1.5 hours of comp time for each overtime hour worked.

The bill has moved quickly since it was introduced April 9. While the Obama Administration has voiced opposition to the bill, and congressional Democrats nearly uniformly voted against it, the atypical speed with which H.R. 1406 has moved might mean that its supporters are positioning the bill to be part of a future bargain involving a minimum wage increase.

Many private employers have long sought the right to offer comp time as public employers have done for years. While comp time may not necessarily result in any financial savings to employers, it does allow for more flexibility in the management of a workforce. Additionally, because employees may prefer paid time off in lieu of overtime compensation for personal reasons, comp time may improve workforce morale. However, employers are likely to find that administering comp time policies under H.R. 1406 is no simple proposition as the bill contains a number of unclear and complicating provisions.

To some degree, conflict over requests to use accrued comp time may be unavoidable. An employee would be entitled to use comp time "within a reasonable period" after requesting it, unless this would "unduly disrupt" the employer's operations. The bill does not state what constitutes a "reasonable period," and does not provide examples of "undue disruption," but it is easy to envision an employee reacting negatively if and when a request to use comp time is denied on either ground.

Employers are likely to experience difficulty in correctly "cashing out" unused comp time. Employers would be required to cash out unused comp time annually and when an employee's employment ends. Determining the "regular rate' for cashing out purposes could therefore be a difficult process for employees who received commissions, for example, over a lengthy period of time. Employees would also be able to request a cash out of accrued comp time, which employers would be required to pay within 30 days of any written request. But a cash out request would also be based on the "regular rate" and therefore entails the same potential complications.

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In addition to such potential problems, the bill has a "sunset" provision under which the legislation would expire in five years. This means that employers may lose the ability to offer comp time just as they finally work the kinks out of administering a comp time plan. As a result, employers may deem the whole enterprise as being more trouble than it is worth.

If the bill ultimately becomes law as part of a minimum wage bargain, employers should evaluate the potential pitfalls of the bill before implementing a comp time policy. In particular, employers should consider whether the benefits of a comp time policy warrant the administrative work that will be necessary to correctly administer a policy. Finally, employers should consider the risk of new and increased litigation under the FLSA.

This article appeared on May 13, 2013 on *Corporate Compliance Insights*.

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